83-2031

No.

IN THE

Supreme Court of the United States

October Term, 1983

JOHN TEHFE and SAMIR TEHFE,

Petitioners,

—against—

GRAND JURY EMPANELLED DECEMBER 16, 1983, UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether or not the Supreme Court decision in Santobello v. New York, 404 U.S. 257 (1971) is violated where a defendant enters into a plea bargain with a reasonable expectation that his plea will cover all of the proceedings with regard to the case under consideration.

2. Whether when the government offers the defendant the possibility of two pleas, a lesser one with cooperation and a greater one without cooperation, allows the government, within the concept of due process of law, to subpoena a defendant to a grand jury after he has elected to plead guilty to the greater charge without cooperation; and whether such election bars the government from subpoenaing him to further questions and possible penalties when the government knew from the outset that it intended to follow that procedure had the defendant pleaded guilty to the greater offense.

3. Whether the government had a duty to advise the defendant and his counsel that when the defendant elected to plead guilty to the greater offense without

the necessity of cooperation, that the government at the time intended to subpoena the defendant to a grand jury to elicit further questions while having a reasonable basis to assume that the defendant would not answer such questions because the defendant had elected to plead guilty without an obligation to cooperate.

4. Whether under the facts of this case the Petitioners entered into a plea bargain with full knowledge and understanding of what it entailed; or whether the government, although unintentionally, did not,by its silence, mislead the Petitioners and cause them to misunderstand what they were doing.

5. Assuming that the Petitioners are entitled to relief, under this type of failure to comply with a plea bargain, are the Petitioners entitled to specific performance, there being some divergence of opinion in the various Circuit.

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Petitioners, JOHN TEHFE and SAMIR TEHFE, who are father and son, were convicted in the United States District Court in Camden, New Jersey, upon their pleas of guilty. Petitioner, JOHN TEHFE, pleaded guilty on September 2nd, 1983 to one count of a superceding indictment, which charged him with violation of 21 U.S.C. Section 848, and was sentenced on October 14th, 1983

to a term of imprisonment of twelve years. Petitioner, SAMIR TEHFE, his son, also pleaded guilty and was sentenced on the same day as above. His plea was to a different count of the same indictment, which charged him with violation of 21 U.S.C., Section 846, and he received a sentence of imprisonment of six years. Thereafter, on the very day of sentence, both Petitioners were subpoenaed to appear before a grand jury to answer questions concerning the circumstances surrounding the crimes for which they were convicted.

Both Petitioners pled their privilege of self-incrimination, they were granted immunity by the United States District Court, and thereafter, after continuing to refuse to answer questions in the grand jury, they were then adjudged to be in contempt in violation of 28 U.S.C., Section 1826 by United States District Judge Stern by orders dated February 23rd, 1984. Pursuant to said orders both Petitioners were committed to the custody of the United States Marshal for the District of New Jersey until such time as they obeyed the orders, and it was further ordered that the sentence which each Petitioner was presently serving on their underlying

conviction be stayed during their confienment pursuant to the contempt orders. Notices of Appeal were filed for both Petitioners dated March 1st, 1984. Thereafter, appeals were taken to the United States Court of Appeals for the Third Circuit, and a judgment order was entered on April 4th, 1984 affirming the orders of the District Court without opinion.

JURISDICTION

The jurisdiction of the Court is invoked under Title 21 U.S.C., Section 1254. No opinion was rendered by the Court of Appeals.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this appeal are whether the Petitioners' rights under the due process clause of the United States Constitution were violated, in that a plea bargain was enforced which the Petitioners did not fully understand; whether the government had an obligation to make their intentions known prior to the entry of the pleas; and whether or not, assuming the Petitioners are correct, the due process clause requires specific performance.

STATUTE INVOLVED

28 U.S.C. Section 1826 Recalcitrant witnesses

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of --

(1) the court proceeding, or

(2) the term of the grand jury, including extensions,

before which such refusal to comply with the court order occurred, but in no event shall confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

FACTS

Both Petitioners appeared before a grand jury, invoked their Fifth Amendment privilege and were thereafter granted immunity by District Judge Stern. They continued to refuse to answer questions and were ultimately held in contempt as described above. Before Judge Stern rendered his decision adjudging both Petitioners in contempt, the Judge entertained argument on January 27th, 1984 and then again on February 23rd, 1984, and it was on the latter date that after hearing argument, the Court ruled that Petitioners were in contempt. On January 27th, 1984, Judge Stern advised both Petitioners that if they continued to refuse to answer questions, they would be committing a contempt of court and that the court could confine them for their action. The time would not count toward the sentences they were both serving. The attorney for SAMIR TEHFE advised the court that both Petitioners entered into a plea bargain, and that part of that plea bargain guaranteed or represented to both Petitioners that they would not have to testify at trial. The attorney said he had many conversations with his client, and the other attorney had spoken to the other Petitioner, and they both were under the impression that

they would not so testify either at the trial or at any other time (emphasis added). They thereafter were subpoenaed, and the attorney advised the court that that action violated the spirit, if not the letter, of the plea bargain. The Court then adjourned the matter.

All of the parties appeared before Judge Stern again on February 23rd, 1984, and counsel for both Petitioners advised the Court that when the Petitioners entered into this plea agreement they were under the impression that they would not have to testify at any time, and the United States Attorney conceded that from the very beginning the government intended to subpoena the Petitioners to a grand jury after they were sentenced. In fact, the position of the Petitioners was clear, in that they claimed that they were offered a deal with cooperation which would have meant pleading to a lesser count than they pleaded to, and which would have included a more lenient sentence; but that it was their belief they took a plea to the higher count with a more onerous sentence with the understanding that they would not have to cooperate or testify. We must also understand that although an interpreter was used for JOHN TEIFE, he spoke very little English, and

SAMIR, his son, was also not extremely fluent in the English language. It is entirely possible that both Petitioners were under a mistaken impression of what their plea agreement was, which we argued in the Court of Appeals.

JOHN TEHFE's attorney advised the Court that when they began to negotiate with the United States Attorney with regard to a plea, there were extensive plea negotiations, and he was advised by the United States Attorney that MR. TEHFE could plead to some charge other than the Section 848 count if JOHN TEHFE would cooperate with the government. In fact, the attorney advised the Court that he urged MR. TEHFE to do just that, but was told by JOHN TEHFE that under no circumstances would he do so, and after communicating that information to the United States Attorney, he was advised that in that case the plea would have to be to the top count. The attorney advised the Court that with regard to SAMIR TEHFE, similar negotiations were taking place, and the upshot of those negotiations was that he, too, would have to plead to the top count if he also refused to cooperate.

The plea bargains were ultimately negotiated and the

pleas were entered into before Judge Gerry, and even after the sentences were imposed there were discussions with the United States Attorney that Petitioners might be permitted to withdraw their pleas and replead to a lesser count if in fact they would cooperate. Again, JOHN TEHFE refused to do so. There were other discussions with the United States Attorney that Petitioners would not be called as witnesses in the case on trial, which were not made part of the written plea agreement. Also, at the time of the plea, Petitioners were both asked whether the letter agreement contained the entire understanding, and both Petitioners told the Court that it did. Still, there was an additional provision that was modified orally and added to the agreement with regard to a prosecution by another jurisdiction, but in the final analysis, both sides conceded that there was no expressed agreement that both Petitioners would not be called before a grand jury.

The Court discussions came down to the argument of defense counsel that inasmuch as Petitioners could have secured pleas to lesser counts and more lenient sentences by cooperating, that they believed that accepting pleas

to the higher counts with harsher sentences supported their understanding that they would never have to become witnesses at any time.

The government's position apparently was that although both Petitioners may have believed they would not have to testify in the grand jury as a result of the negotiations that took place, their belief was in error and was not actionable because there was no expressed agreement in the plea agreement or on the record dealing directly with the situation of testifying in the grand jury.

Counsel told the Court that the government had sought to gain the cooperation of both Petitioners from the very beginning of this prosecution and very generous offers were made, both expressed and implied. In fact, SAMIR TEIFE's attorney told the Court that he had the clear understanding that if both Petitioners cooperated, SAMIR at least might not spend another day in jail. The government even was agreeable to allowing Petitioners to retract their pleas and to plead to counts which would involve lesser sentences, even after the subpoenaes had been issued. Counsel argued that the government knew

from day one that both Petitioners were not agreeable to the offers made to them, and while there was never a specific promise by the government that Petitioners would not be called before a grand jury, the attorney told the Court that it was his clear understanding from the substance of these talks that it was very strongly implied that such was the case. This implication was based in part on Petitioners' refusal to accept the very generous proposals of the government, and that these impressions in the mind of both Petitioners were held in good faith.

It was also established that all during the plea negotiations and from the outset of the case, while counsel was advising the prosecution that the TEHFE's would not cooperate, the government knew that they were going to subpoena both Petitioners at some time, and they never came forward and advised counsel that they would be attempting to bring both Petitioners before a grand jury after the case was over. That statement by defense counsel was not in any way challenged by the government after the Court asked if everyone was satisfied with the record, and the Court thereafter

read its decision into the record and basically said that since the plea bargains did not specifically include the government's promise not to subpoena the Petitioners to a grand jury, that they could not refuse to give testimony.

The Court then found that Petitioners were not in criminal contempt but merely in contempt of Court without a legal excuse. Petitioners were ordered to testify and they were committed pursuant to the orders referred to above.

POINT I

PETITIONERS REASONABLY MISUNDERSTOOD THE NATURE OF THEIR PLEA BARGAIN. THEY SHOULD BE ENTITLED TO RELIEF AS A MATTER OF DUE PROCESS OF LAW.

This proceeding presents some interesting issues with regard to plea negotiations, in that the question arises as to whether a good faith mistake on the part of a defendant accepting a plea can form the basis for relief, and also whether the government is obligated during the course of negotiations to make clear to defense counsel what their intentions are with regard to future action to be taken with respect to the defendants after the plea and sentence are effected.

Plea bargaining is a long established practice and the Courts have recognized that it is absolutely necessary for the due administration of justice. This and other Courts have also found that plea bargaining must be conducted in good faith and that where promises are made they must be kept. Santobello v. New York, 404 U.S. 257 (1971); Bordenkircher v. Hayes, 434 U.S. 357 (1978); United States v. Levine, 457 F.2d 1186 1189 (10th Cir. 1972); State v. Brown, 367 A. 2d

417, 419 (N.J. 1976). Plea bargaining is an important part of the due administration of justice.

Santobello clearly held that a defendant is entitled to some form of relief when the government reneges on a plea bargain, and it cleared the way for that relief to be either vacature of the plea or specific performance, depending on what would be most appropriate in each situation. This Court recognized that disposition of charges after plea bargaining is not only essential but highly desirable because it helped to obtain pleas and final disposition of many criminal cases, and it described other good reasons for the practice as well.

The Courts have also agreed that before a defendant can enter a plea certain non-waivable factors must be present. These include the idea that a defendant must knowingly and intelligently enter into the plea agreement and that a defendant is required to have a full understanding of the nature of the charges and the consequences of pleading guilty and being sentenced under the agreement. Kerscheval v. United States, 274 U.S. 220,223 (1927); McCarthy v. United States, 394 U.S. 459 (1969). In the McCarthy case, the Court decided that

the defendant did not understand the nature of the charges against him where he expected a probationary sentence and received a one year jail term. There has been much litigation since McCarthy was decided, and the voluntary-intelligent formula has come into effect, which has generally been embodied in Rule 11 of the Federal Rules of Criminal Procedure. Thus, the Courts have required inquiry into whether a defendant knows the nature of the charges against him, whether he has been informed of the consequences of his plea, whether he waives several constitutional rights on the record, whether there is a sufficient factual basis to support the taking of the plea, whether there is a specific plea agreement and whether other specific conditions exist.

Obviously, one of the inquiries that must be made is an inquiry as to whether there is a plea bargain that has been agreed upon. United States v. Scharf, 551 F.2d, 1124 (8th Cir. 1977), and it goes without saying that before a plea bargain can be enforced, the Court must make a finding as to whether an understanding in fact exists. In making such a finding it has been held that any ambiguity should be resolved in favor of a defendant, and a plea based conviction might be bad where there was

no clear promise and a layman might have misunderstood the situation and been misled. State v. Brown, supra.

The Petitioners contend that that is exactly the situation at bar. We also refer this Court to State v. Davis, 601 P.2d, 327 (Ariz. App. 1979), where although no error was specifically committed, it was decided that a prosecutor had violated the spirit of a plea agreement. Where a defendant, even though erroneously but reasonably, has a wrong impression, he must be entitled to relief. United States v. Lester, 247 F.2d 496 (2nd Cir. 1957); People ex rel Valle v. Bannon, 110 N.W.2d, 673 (Mich.1961); State v. Rosenbaum, 601 P.2d 314 (Ariz. App. 1979).

In this case, one of the attorneys attested to the fact that even he believed there would be no subpoenaing of the Petitioners to a grand jury, and articulable reasons were laid before Judge Stern to indicate the basis for the misunderstanding. It seems quite reasonable that where Petitioners, who are not totally conversant in English, were given a choice of one plea and sentence conditioned upon cooperation and a much harsher plea and sentence conditioned upon refusal to cooperate, that they could reasonably believe that by taking the

harsher sentence the matter would be ended forever. It is also important to recognize the fact that the United States Attorney always intended to supoena both Petitioners, even while the plea negotiations were being conducted, and although we do not contend any bad faith or improper motive to the government, the government must still have been under a duty to let Petitioners know what their intentions were. After all, this is not a case where Petitioners were at liberty and had they known they were to be subpoenaed they could have absconded. The Petitioners had not made bail, and there is absolutely no reason why the government should have held back this information. Had Petitioners and their counsel known of the government's intentions, the choice that they were about to make could have been made with complete knowledge and greater intelligence. Courts have been known to make findings with regard to certain facts based upon implication, such as an implied waiver of a defendant's rights, Tipton v. State, 498 P.2d 429, 432 (Okla. Ct. Cr. App. 1972), so it is not unreasonable for a Court to conclude that a defendant fairly and reasonably believed a certain fact to exist based upon discussions had between his attorney and the

government.

Under appropriate circumstances, the fact that the defendant has been misled, even though there is no intentional attempt to defraud him, may render his plea subject to attack, United States v. Briscoe, 432 F.2d 1351 (D.C. Cir. 1970), and where the objective circumstances reasonably justify a defendant's mistaken impression, it has been found that the plea was entered into without full knowledge of the consequences. United States v. Crusco, 532 F.2d 21 (3rd Cir. 1976). Impressions or understandings not specifically made in a written plea agreement or made a part of the record have been recognized to exist in certain situations, and, in fact, it has even been recognized that where a defendant declares on the record that no promises have been made to him pursuant to a plea bargain, such a statement is not invoilable. United States ex rel Culbreath v. Rundle, 466 F.2d 730 (3rd Cir. 1970); United States v. Tweedy, 419 F.2d 192,193 (9th Cir. 1969); Scott v. United States, 419 F.2d 264,274 (D.C. Cir. 1969); Browder v. United States, 398 F.Supp. 1042,1045 (D. Ore. 1975), aff'd. 544 F.2d 525 (1976).

The mistake made by both Petitioners in this case is reasonable and justifiable, based on the circumstances. If

attorneys could state, as they have, that they, too, were under the impression that Petitioners would not have to testify anywhere, then certainly people of more limited education and understanding could have the same misimpression. It is also possible to conclude that although the government is not guilty of any malice or misconduct here, it is still responsible to a large extent for creating the situation where the facts were such that Petitioners could get the wrong impression of what their agreement was. We believe that under the circumstances of this case there was no reason for the government to not advise defense counsel of what their course of action would be, and the failure to clearly tell the attorneys that there would be a subpoena, or in the alternative the failure to put into the plea agreement that it specifically did not cover future grand jury appearances, created the situation.

There is ample precedent to require prosecutors under certain circumstances to disclose evidence or other circumstances when engaged in plea negotiations. Professor Uviller has said that "pre-plea disclosure by the prosecutor is essential to informed pleading." Uviller, Pleading Guilty: A Critique of Four Models, 41 Law & Contempt.

Prob. 102,114 (1977). Thus, under certain circumstances, there are obligations to disclose evidence: a pre-sentence report, a plea bargain of another witness, evidence favorable to the defendant, and other matters. State v. Harris, 585 P.2d 450 (Utah, 1978); United States v. Ramos Algarin, 584 F.2d 562,564 (1st Cir. 1978); Skinner v. Cardwell, 564 F.2d 1381 (9th Cir. 1977), cert. denied, 435 U.S. 1009 (1978); United States v. Johnson, 605 F.2d 1088,1089 (8th Cir. 1979); United States v. Sanfilippi, 564, F.2d 176 (5th Cir. 1977).

POINT II

PETITIONERS SHOULD BE ENTITLED TO SPECIFIC PERFORMANCE. THE GRAND JURY SUBPOENAES HEREIN SHOULD BE VACATED.

Santobello recognized that where a plea pursuant to a plea agreement was not adhered to by the government, that both the remedy of vacating the plea or specific performance could lie. Santobello v. New York, supra at 263. This Court vacated the conviction and remanded the case to a lower Court for its determination as to whether specific performance should lie or whether the defendant

should be given the opportunity to withdraw the plea of guilty.

There is an increasing tendency to select the remedy of specific performance where the factors are such that such a remedy would best enforce the bargain. Smith & Davis, The Legitimation of Plea Bargaining: Remedies for Broken Promises, 11 Am.Crim.L.Rev. 771,793 (1973). Many Courts have thus approved specific performance and have held that in many circumstances it would be the most appropriate remedy. Taylor v. Kavanagh, 640 F.2d 450 (2nd Cir. 1981); United States v. Ammirato, 670 F.2d 552 (11th Cir. 1982); People v. Reagan, 235 N.W.2d 581 (Mich. 1975); People v. DeWolfe, 36 A.D.2d 618,318 N.Y.S. 2d 810 (App.Div. N.Y. 1971); United States v. Hallam, 472 F.2d 168 (9th Cir. 1973). Thus, where the agreement contemplated the dropping of charges other than the ones to which the defendant pleaded, specific performance is appropriate because the dropping of these charges would secure the bargain to the defendant that he expected. United States v. Eggert, 504 F.Supp. 28 (W.D. Okla. 1980); State v. Davis, 188 So.2d 24 (Fla. 1966).

It has always been held that enforcement of plea

bargains via the remedy of specific performance enhances confidence in the making of the bargain and encourages defendants to plead guilty. Plea Bargaining: Is Court Enforcement Appropriate?, 17 Stan.L.Rev. 316,319 (1965); State v. Hingle, 319 So.2d 205 (La. 1962).

In this case the remedy is not only appropriate, but extremely simple. If it is concluded that Petitioners reasonably were justified in expecting not to be called as witnesses before a grand jury anywhere else and subjected themselves to a more severe sentence by taking a higher plea based upon that consideration, then all that has to be done is to order that the subpoenaes be quashed, and the bargain will be fully enforced.

CONCLUSION

THE PETITION OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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Of Counsel

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 84-5150 84-5151

IN RE GRAND JURY
EMPANELLED DECEMBER 16, 1983

John "Ali" Tehfe and Samir Tehfe,
Appellants.

Appeal from United States District
for the District of New Jersey
(D.C. Misc. No. 84-12)

Submitted under Third Circuit Rule 12(6)
April 4, 1984
Before: SLOVITER and BECKER, Circuit Judges
and MENCER, District Judge*

JUDGEMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED and ORDERED that the Order of the District Court of February 23, 1984 holding John Tehfe and Samir Tehfe in civil contempt be, and the same is, hereby affirmed.

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*Hon. Glenn E. Mencer, United States District Court for the Western District of Pennsylvania, sitting by designation.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN THE MATTER OF THE
GRAND JURY EMPANELLED
DECEMBER 16, 1983
MISC. NO. 84-12
JOHN TEHFE, WITNESS

JUDGMENT AND COMMITMENT
FOR CONTEMPT

On motion of W. Hunt Dumont, United States Attorney for the District of New Jersey (Cathy Fleming, Assistant United States Attorney appearing), for an order by the Court to enforce its order of February 17, 1984, heretofore entered in the above-entitled matter, the witness, John Tehfe, appearing before the Court and with counsel, Edward J. Plaza, Esq., and said witness having admitted that he had refused and would continue to refuse to answer the questions directed to him before the grand jury, as set forth in the affidavit of Cathy Fleming sworn to February 17, 1984, and the Court having heard the argument of counsel, it is hereby

ORDERED AND ADJUDGED pursuant to Title 28, United States Code, Section 1826(a) that John Tehfe be and hereby is committed to the custody of the United States Marshal for the District of New Jersey until such time as he shall obey said order, and it is further

ORDERED AND ADJUDGED that the sentence John Tehfe is presently serving is hereby stayed during his confinement pursuant to this Order.

HONORABLE HERBERT J. STERN
United States District Judge